In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1364

LEE W. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 121–122) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1971. On February 18, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied adequate representation by retained counsel.

419-858—71

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of all counts of a twelve count indictment which charged the embezzlement of federal funds in violation of 42 U.S.C. (Supp. V) 2703(a). On March 16, 1970, he was sentenced to concurrent terms of five years' imprisonment on each count and fined a total of $20,000. The court of appeals affirmed.

The evidence showed that during 1966–1968, the Office of Economic Opportunity (OEO) granted approximately $516,000 to the Rough River Area Council, Inc. (Rough River) in Hardinsburg, Kentucky, to carry out community action programs (1 T. 44, 46, 50, 60).[1] On September 30, 1968, an OEO evaluation team sought to examine Rough River's records. Petitioner denied the team access to the records, but after several days' delay, another employee of Rough River made the records on file available. The team found irregularities in the records and the government then closed down the Rough River operation and seized what records it found (1 T. 62–63, 71–72, 83).

Subsequent investigation revealed that, unknown to other personnel associated with Rough River, petitioner and his secretary had opened a bank account in the name of Rough River in Owensboro, Kentucky, a city outside the two county area served by Rough River (1 T. 104–106, 151, 176–192; 4 T. 29). Between

[1] "T." preceded by the volume number refers to the four volume trial transcript. "App." refers to petitioner's appendix, on file with the Clerk of this Court, which contains portions of the trial record.

April and October 1968, petitioner deposited approximately $260,000 in this Owensboro account and issued checks on it, without filing supporting vouchers with Rough River as to the purpose of the disbursements (1 T. 108–119). By this means petitioner obtained approximately $13,000 of these funds, which was converted to petitioner's personal uses as follows: (1) deposits to petitioner's personal checking account (Counts 1, 2, 6, 7); (2) purchase of two real estate lots (Count 4); (3) a down payment on a new automobile for him (Count 8); and (4) capital contributions for his secretary and himself to a private real estate venture having no connection with Rough River (Counts 3, 5, 9) (1 T. 128–141, 210, 212, 215, 228, 230, 241–247, 249; 2 T. 7, 45, 55, 58, 65–67, 71, 189, 195; 3 T. 96, 183, 186; 4 T. 90).[2]

Petitioner also wrote checks (Counts 10–12) to himself on Rough River's regular bank account in Hardinsburg, and in this fashion obtained additional Rough River funds for his own uses. These checks reimbursed petitioner twice for some expenses (3 T. 117–119), paid for supplies which petitioner used personally (2 T. 80; 3 T. 40, 126), and helped purchase a trailer for petitioner's daughter (2 T. 99, 103).

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[2] In purchasing the car and in making the real estate capital contributions, petitioner used counter checks, so that the recipients of the checks were unaware that they were receiving funds from a Rough River bank account (2 T. 58; 4 T. 66–67, 104). Later, after the arrival of the OEO team, petitioner sought the return of his partnership investment and told his co-investor that $5,000 of the sum he and his secretary had contributed was "Office of Economic Opportunity money" (2 T. 13).

ARGUMENT

1. Petitioner first contends (Pet. 4–8) that he was denied the effective assistance of counsel because of the incompetence of his attorney. Petitioner was represented during the trial by retained counsel to whom he had paid a substantial fee. At the outset of the fourth and final day of trial, after the defense had presented most of its case, counsel sought to withdraw, asserting that he was ill. He presented his own affidavit to that effect, but no affidavit of any physician. Petitioner joined in the request. The trial judge stated that such a tactic by petitioner and his counsel had been anticipated and that he considered the effort improper, and ordered counsel to proceed (4 T. 3–7; Pet. 2–3). Counsel thereafter presented four more defense witnesses, had the prosecution stipulate to the testimony of three others who failed to appear voluntarily (4 T. 34–39; App. 21–25), and presented argument in petitioner's behalf (4 T. 41–55).

In an appendix of over one hundred pages, under eight separate headings, petitioner arranges and sometimes repeats portions of the trial transcript in an effort to show counsel's derelictions (App. 9–116). The record as a whole, however, shows that petitioner was vigorously defended by his retained counsel, and petitioner's assertion on this score is without merit. Petitioner gave his direct testimony almost exclusively in narrative form (2 T. 151–208, 3 T. 7–45). During the course of it, petitioner repeatedly cautioned, interrupted, and reprimanded his counsel (2 T. 156, 158, 160, 161, 184–185, 198, 201; 3 T. 44). This apparently

was part of a deliberate effort to make counsel appear incompetent. Even counsel's own opinion that he may have been ineffective is not controlling when, as in the present case, the record shows the contrary and provides substantial evidence of petitioner's guilt. See *United States* v. *Mooney*, 417 F. 2d 936, 941 (C.A. 8), certiorari denied, 397 U.S. 1029.

2. Nor is there merit in petitioner's claim (Pet. 8–9) that he suffered "fundamental unfairness" because the trial court denied his motion for new trial without a hearing and without granting subsequently retained counsel a requested delay. Petitioner was convicted on February 23, 1970. On February 24th he retained other counsel (App. 5), who filed a motion for new trial based on inadequacy of counsel—the single issue petitioner has raised, both in the court below and in this Court—and requested a hearing on that motion "one month after the transcript of evidence has been entered of record" (App. 3–4). On March 3, 1970, the court denied the new trial motion without a hearing (App. 7).

There is no requirement that a hearing be had on a motion for new trial; this, as well as the granting of the motion, is a matter left to the discretion of the trial court. Cf. *United States* v. *Cashio*, 420 F. 2d 1132, 1135–1136 (C.A. 5), certiorari denied, 397 U.S. 1007. Here, the trial judge had observed the conduct of petitioner's retained counsel and was in a position to know if the inadequacy claim was valid. Although new counsel requested a delay until the trial transcript was available, in this situation the transcript

was not necessary to the court's consideration of the challenge. In essense, this contention merely restates petitioner's sole point, that he received inadequate legal assistance. The court's conclusion that petitioner was adequately represented is fully supported by the record as a whole, as we note above. See *United States* v. *Johnson,* 327 U.S. 106, 111–112.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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